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LORD MANSFIELD AND LORD DENNING: SOME PITFALLS AND POSSIBILITIES PRESENTED BY THE GREAT JUDGE APPROACH TO LEGAL HISTORY AND THE LAW OF CONTRACT.

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Many modern legal historians are willing to downplay the role of individual judges, preferring instead to treat judges as mouthpieces of social forces.[1] It was not always the case. Forty five years ago, in his Hamlyn Lecture of 1959, *Judge and Jurist in the Reign of Victoria*, Cecil Fifoot argued that 'Law, no more than any other human creation, is the automatic result of natural forces or intellectual movements. It is made by men… English lawyers of all men, should believe in the power of the great judge'.[2] Anyone attempting to summon up the ghost of Thomas Carlyle these days risks being labelled a conservative at best, or naïve at worst.[3] This type of legal history is certainly difficult to do well. It is sometimes tempting to accept reputations at face value. It is easy to forget that judges are frequently inconsistent. Their views

* Department of Law, Durham University. I am grateful to my former colleague at the University of Birmingham, Mr Peter Cook, who first suggested the subject. Since writing this paper, I have come across CMA McCauliff's, 'A Theme of Fairness Revisited: Lord Mansfield's Legacy for a Holistic Theory of Contract Today' [2000] Denning LJ 67, which considers some of the same issues. I find myself at odds with Professor McCauliff's interpretation on many points but his article is a useful antidote to some of the more radical arguments herein.

[1] For an overview of recent trends in legal history, see KJM Smith and JPS McLaren, 'History's living legacy: an outline of modern historiography of the common law' (2001) 21 LS 251. This approach is the dominant feature of the last thirty years.

[2] (Sweet and Maxwell, London, 1959) 12.

[3] *On Heroes, Hero-worship and the Heroic in History* (Ams Press New York 1969) p. 1 'For as I take it, Universal History, the history of what man has accomplished in this world, is at bottom the History of the Great Men who have worked here'.

can change over time and according to the context. An examination of some of the decisions of Lord Mansfield and Lord Denning on the law of contract,[4] throws up some surprises which raise questions about the popular reputations of two of the most distinctive judges of the last two hundred and fifty years.

1. LORD MANSFIELD – TAKING CERTAINTY SERIOUSLY.

In *Anderson v Temple* in 1768 Lord Mansfield explained that:

> The most desirable object in all judicial determinations, especially in mercantile ones, (which ought to be determined upon natural justice, and not upon the niceties of law,) is, to do substantial Justice.[5]

These remarks do not appear to come from a judge who placed much value on certainty in the law. Contemporaries were quick to criticise Lord Mansfield on just these grounds. Writing in the 1770s, the controversialist Junius complained that:

> Instead of those certain, positive rules, by which the judgment of a court of law should invariably be determined, you have fondly introduced your own unsettled notions of equity and substantial justice…. In the meantime the practice gains ground; the court of King's Bench becomes a court of equity, and the judge, instead of consulting strictly the law of the land, refers only to the wisdom of the court, and to the purity of his own conscien

When Lord Eldon recalled a remark that Lord Mansfield is supposed to have made to De Grey CJ that 'he never liked law as well as when it was like equity',[7] he did not intend a compliment.[8] Turning to the judgments themselves, a search of the printed reports reveals that, particularly in the first half of his time as Chief Justice, Lord Mansfield made free use of terms like 'equity', 'justice' and 'good conscience'.[9] His willingness to incorporate mercantile practice, whether through special mercantile juries[10] or by consulting more widely with underwriters[11] and others engaged in particular types of insurance contract,[12] suggests that the need for certainty was secondary to the desire to build a law of contract that reflected the needs of merchants.

At the same time, the importance of context should not be overlooked. James Park described the law of insurance prior to Lord Mansfield's appointment: 'there have been but few positive regulations upon insurance, the principles, on which they were founded, could never have been widely diffused, nor very generally known'.[13] The relative absence of Common law authority meant that insurance presented the greatest opportunity for innovation. It was probably no coincidence that this was also the very area where Lord Mansfield made particularly free use of Civilian sources.[14]

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[7] *Dursley v. Fitzharedinge* (1801) 6 Ves 251, 260; A Lincoln and R McEwen (eds.), *Lord Eldon's Anecdote Book* (Stevens & Sons, London, 1960) 238.

[8] In *The Lives of the Chief Justices of England* (London, 1849) vol. 2 pp 394-95, Lord Campbell named Lord Eldon along with Lord Kenyon as a leading critic of Lord Mansfield.

[9] *Vintner's Co v. Passey* (1757) 1 Kenyon 500, 503; *Anderson v. George* (1757) 1 Burr 352, 353 'justice and good conscience'; *Windham v. Chetwyn* (1757) 1 Burr 414, 430; *Rose v. Green* (1758) 2 Kenyon 173, 178; *Godin v. London Exchange Assurance* (1758) 2 Kenyon 254, 256; *Burton v. Thompson* (1758) 2 Kenyon 375, 376; *Hawkes v. Crofton* (1758) 2 Kenyon 389, 390; *Foxcraft v. Devonshire* (1760) 1 Wm Bla 193, 195; *Robinson v. Bland* (1760) 1 Wm Bla 256, 263; *Baskerville v. Brown* (1761) 1 Wm Bla 293, 294; *Ingle v. Wandsworth* (1762) 3 Burr 1284, 1286; *Plumer v. Marchant* (1762) 3 Burr 1380, 1384; *Bird v. Randall* (1762) 3 Burr 1345, 1353 'justice and conscience'; *Goodright d Carter v. Staplan* (1774) 1 Cowp 201, 203 'natural justice and equity'; *Holman v. Johnson* (1775) 1 Cowp 341, 343.

[10] Oldham, (n 4)vol 1, 82-102; J Oldham, 'The Origins of the Special Jury' (1983) 50 Univ. Chic. LR 137, 173-175.

[11] *Glover v. Black* (1763) 3 Burr 1394; *Camden v. Cowley* (1763) 1 W Bla 417; *Wilson v. Smith* (1764) 3 Burr 1550, 1556. Sometimes underwriters were of course members of a special jury see, *Vallejo v. Wheeler* (1774) 1 Cowp 143, 150.

[12] *Salvador v. Hopkins* (1765) 3 Burr 1707, 1714.

[13] J Park, *System of the Law of Marine Insurance* (2nd edn, London, 1790) xliv. Park was guilty of considerable exaggeration see, WS Holdsworth, 'The Early History of the Contract of Insurance' (1917) 17 Colum L Rev 85.

[14] On the influence of Civilian writers on Lord Mansfield see, WS Holdsworth, *A History of English Law* (Methuen, London, 1938) vol 12, 467; D Coquillette, 'Legal Ideology and Incorporation IV: The Nature of Civilian Influence on Modern Anglo-American Commercial Law' (1987) 67 BUL Rev 877, 949-62. For

In the years preceding the Industrial Revolution, negotiable instruments were widely used as means of easy credit transfer.[15] Writing in 1760, Timothy Cunningham described the bill of exchange as 'the principal medium of foreign and inland commerce'.[16] A few years later George Crooke observed that, 'There is scarce any person either gentleman, tradesman, or farmer, but what must, at some times, have occasion for bills of exchange'.[17] Lord Mansfield himself admitted that bills of exchange were 'of great consequence to trade and commerce especially in this country and at this time'.[18] Negotiable instruments were much better established as a feature of common law litigation than insurance by the time Lord Mansfield took office. Some matters still needed to be settled but the basic legal framework was already in place.[19] There was also a much larger volume of literature devoted to the subject. [20] Rather than building a legal framework from scratch, Lord Mansfield was much more concerned to ensure that the existing law worked as well as possible. With this end in mind, he set about removing any obstacles to smooth enforcement[21] and inconsistencies between different types of negotiable instruments.[22] In the process, Lord Mansfield was sometimes prepared to face down mercantile objections.[23]

Over time, Lord Mansfield's position began to harden. As early as 1774, he stated that 'in mercantile transactions the great object should be certainty'.[24] Eight years later he warned: 'Nothing is more mischievous than uncertainty in mercantile law' and, as a result, 'in all mercantile cases there are

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examples see, *Goss v. Withers* (1758) 2 Burr 683; *Pelly v. Royal Exchange Assurance Co.* (1760) 1 Burr 341.

[15] R Floud and P Johnson (eds.), *The Cambridge Economic History of Modern Britain 1700-1860* (CUP, Cambridge, 2004) 53-55.

[16] T Cunningham, *The law of bills of exchange, promissory notes, bank-notes, and insurances* (1760) iii.

[17] G Crooke, *The Merchant, Tradesman and Farmer's director* (1778) iii.

[18] *Blesard v. Hirst* (1770) 5 Burr 2670, 267; *Grant v .Vaughan* (1764) 1 Wm Bla 486, 487.

[19] J Holden, *The History of Negotiable Instruments in English Law* (Anthlone Press London 1955) 99-144; JS Rogers, *The Early History of the Law of Bills and Notes* (CUP, Cambridge, 1995) 210-222.

[20] W Forbes, *A Methodical Treatise Concerning Bills Of Exchange* (1718); Anon, *Obscurities and Defects of the Mercantile Law Considered, in an Essay on Bills of Exchange* (1769). Later eighteenth century works include J Bayley, *A Short Treatise on the Law of Bills of Exchange, Cash Bills, and Promissory Notes* (1789); S Kyd, *A Treatise on the Law of*

two objects, convenience and certainty'.[25] He recognised that: 'All questions on mercantile transactions, but more particularly upon policies of insurance, are extremely important and ought to be settled'.[26] Much had been done. William Blackstone wrote:

> The learning relating to marine insurance hath of late years been greatly improved by a series of judicial decisions, which have now established the law in such a variety of cases, that … they would form a very complete title in a code of commercial jurisprudence.[27]

Merchants, as well as judges, no doubt played a part as insurance contracts were drafted in an increasingly sophisticated way.[28] Mercantile practice remained relevant where the law remained to be settled[29] or when hard and fast rules were difficult to draw as, for example, when it came to determining whether or not a term in an insurance contract should be treated as a warranty.[30] But, even here, Lord Mansfield was increasingly reluctant to place too much weight on mercantile usage at the expense of certainty.[31]

According to John Wesket, writing in the 1780s, much still needed to be done:

> What, in any country, could be more preposterous and intolerably grievous; or more reproachful to a great commercial Nation, in particular; than that the Administration of private Justice, in the Affairs of MERCHANTS should be solely in the Hands of Inconclusiveness!'[32]

[25] *Medcalf v. Hall* ibid. 113. Lord Mansfield made these remarks in a direction to a jury.
[26] *Nutt v. Hague* (1786) 1 TR 323, 330. For similar statements see, *Buller v. Harrison* (1777) 2 Cowp 556; *Milles v. Fletcher* (1779) 1 Doug 231, 232; *Simond v. Boydell* (1779) 1 Doug 268, 270-71.
[27] W Blackstone, *Commentaries on the Laws of England* (Clarendon Press Oxford 1766) vol 2, 461.
[28] *Vallejo v. Wheeler* (1774) 1 Cowp 143, 145.
[29] *Carvick v.Vickery* (1783) 2 Doug 653.
[30] Oldham, (n00) vol 1, 462
[31] Ibid.
[32] J Wesket, *A Complete Digest of the Theory, Laws, and Practice of Insurance* (1781) xvi.

With the growth of negotiable instruments, the paradigm of contractual relations as face to face dealing involving an exchange expressed through the doctrine of consideration, was becoming outdated. In *Pillans v. Van Mierop*,[40] Lord Mansfield was prepared to abandon consideration when a contract between commercial parties was put into writing.[41] It seems likely that he was trying to extend the practice of negotiable instruments, where consideration was all but emasculated, to all written contracts between commercial parties, rather than proposing a radical restructuring of the law of contract.[42] Lord Mansfield was advocating an important exception developed incrementally from existing practice.[43] It was Lord Mansfield's fellow judge, Wilmot J, who advocated a more fundamental re-alignment of contract. In an opinion that drew on Civil Law and Natural law,[44] he argued that the requirement of consideration should be abandoned for all types of written contract.[45] It was his revolt against orthodoxy which was stamped on in *Rann v. Hughes*.[46]

The scale of Lord Mansfield's second attempt to reform consideration is frequently misunderstood. It is often claimed that Lord Mansfield was keen to import a doctrine of moral consideration into the Common law.[47] This view originated in the early nineteenth century[48] amongst those anxious to extend the boundaries of the doctrine of consideration.[49] In reality, *Atkins v. Hill*[50] and *Hawkes v. Saunders*[51]were less about introducing moral consideration than extending the Common law into the territory of the Court of

[40] (1765) 3 Burr 1663. For greater detail on these authorities, see W Swain, 'The Changing Nature of the Doctrine of Consideration, 1750-1850' (2005) JLH 55.
[41] (1765)3 Burr 1663, 1669.
[42] On the emasculation of consideration in cases of negotiable instruments, see Holden, (n00) 102-103.
[43] Although consideration was not part of Scots law, another possibility is that Lord Mansfield was influenced by the way that Scots law relaxed formality requirements in mercantile transactions. For the Scots rules see D Walker (ed.), Viscount Stair, *The Institutions of the Law of Scotland* (University of Edinburgh Press, Edinburgh, 1981) 1.10.3; Lord Bankton, *An Institute of the Laws of Scotland* (1993) Stair Society 1.11.31.
[44] Wilmot J, like Lord Mansfield, had a deep interest in Civil law, see J Wilmot, *Memories of the Life of The Right Honourable Sir John Eardley Wilmot Knt. Late Lord Chief Justice of the Court of Common Pleas* (2nd edn, 1811) 210.
[45] 3 Burr 1663, 1670.
[46] (1778) 4 Bro PC 27, 7 TR 350 note; LI MS Misc. 130 f. 74, 2 ER 18, 101 ER 1013.
[47] W Holdsworth, *A History of English Law* (Methuen London 1925) vol 8, 25-42; Fifoot, (n00) 129-135. For more detail on these developments, see Swain, (n00) 53-56.
[48] In their note to *Wennall v. Adney* 3 B & P (note) written in 1814, the law reporters Bosanquet and Puller observed that, 'an idea has prevailed of late years that an express promise, founded simply on an antecedent moral obligation, is sufficient to support an assumpsit'.
[49] Swain, (n00) 57-59.
[50] (1775) 1 Cowp 284.
[51] (1782) 1 Cowp 289.

Chancery, by allowing assumpsit to be used to enforce promises on legacies. Consideration in both instances rested on liability in Equity rather than on a moral obligation. Taken in isolation, there are some passages in Lord Mansfield's judgments which, at first sight, appear more radical. He accepted that some promises could be enforced in assumpsit which 'would otherwise only bind a man's conscience'. Contracts rendered unenforceable through the Statute of Limitations, infancy or bankruptcy were cited as examples.[52] Many of these agreements were already enforceable.[53] They were simply rationalised in a new way. They also fit within an older tradition once it is recognised that, from its inception, the doctrine of consideration had allowed some flexibility around the edges so as to encompass situations that are difficult to fit within the reciprocal analysis.[54] Significantly, no attempt was made at the time, or later on, to use conscience-based consideration outside these examples.

The precise nature of a third reform continues to be debated. In *Moses v. Macferlan*,[55] in an important passage, Lord Mansfield explained that in money had and received:

> If the defendant be under an obligation, from the ties of natural justice to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ('quasi ex contractu' as the Roman law expresses it.)…This species of assumpsit ('for money had and received to the plaintiff's use') lies in numberless instances, for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had, by law, authority to receive from such third person.[56]

[52] *Atkins v. Hill* (1775) 1 Cowp 284, 288-289; *Hawkes v. Saunders* (1782) 1 Cowp 289, 290.
[53] *Heyling v. Hastings* (1698) 1 Ld Raym 421; *Dean v. Crane* (1704) 6 Mod 309; *Yea v. Fouraker* (1760) 2 Burr 1099 (Statute of Limitations); *Southerton v. Whitlock* (1726) 2 Stra 690 (infancy). The promise to pay subsequent to a certificate in bankruptcy may have been a new ground for liability, see also *Trueman v. Fenton* (1777) 2 Cowp 544.
[54] D Ibbetson, 'Consideration and the Theory of Contract in the Sixteenth Century Common Law' in J Barton (ed), *Towards a General Law of Contract* (Duncker and Humblot, Berlin 1990) 67.
[55] (1760) 2 Burr 1005, 1 Wm Bla 219. For more detail on this important decision see W Swain, 'Moses v. Macferlan' in C Mitchell and P Mitchell (eds.), *Landmark Cases in the Law of Restitution* (Hart, Oxford 2006) 19.
[56] (1760) 2 Burr 1005, 1008-1009.

Lord Mansfield would variously describe money had and received as, 'equitable',[57] 'very beneficial',[58] 'a very liberal action'[59] and 'much encouraged'.[60] At first sight, the action seems to be based on general principles, 'the ties of natural justice'. But a remark made by Lord Mansfield two years later - 'This is an action on the case which I have often observed is almost equivalent to a bill in equity'-[61] provides a better clue to his intentions. There was a very concrete link between money had and received and Equitable remedies.[62] Money had and received was likened to a bill in Equity on several occasions,[63] as was the closely related action for money paid against a surety.[64]

Writing in the late nineteenth century, Sir William Anson claimed that money had and received at this time threatened to expand into the vagueness of 'moral obligations'.[65] In fact, by the late 1770s, Lord Mansfield was beginning to favour a more cautious approach and even warned that the action 'ought not to be carried too far'.[66] Part of the problem was that, because money had and received was a straight forward action to plead,[67] plaintiffs began to use money had and received as a way of gaining procedural advantages in claims on warranties.[68] This dodge was soon stopped and by the mid-1780s, a broader restriction emerged, preventing money had and received from being when the

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[57] *Floyer v. Edwards* (1774) 1 Cowp 112.
[58] *Towers v. Barrett* (1786) 1 TR 133.
[59] *Sadler v. Evans* (1766) 4 Burr 1984, 1986; *Price v. Neal* (1762) 3 Burr 1354. He used similarly expansionist terminology to describe the action for money paid around this time see, *Decker v Pope* (1757) LI MS Misc. 129 (unfold.). Lord Mansfield made the same comment about actions on the case generally in *Gardiner v. Crosedale* (1760) 1 Wm Bla 198, 199.
[60] *Moses v. Macferlan* (17600 2 Burr 1005, 1011.
[61] *Bird v. Randall* (1762) 1 Wm Bla 386, 388.
[62] Others have stressed the close relationship between money had and received and Equity: B Kremer, 'The Action for Money Had and Received' (2001) 17 JCL 93; G Virgo, 'Restitution Through the Looking Glass: Restitution Within Equity and Equity Within Restitution' in J Getzler (ed.), *Rationalizing Property, Equity and Trusts Essays in Honour of Edward Burn* (Lexis/Nexis, London, 2003) 82, 87-88. Money had and received was very similar to situations where Ch3.79999 Tm(ex)Tj10.099 02 0 0 10.02 294.52577 223j10T7 8437 235.32002 Tm(

mistaken.[76] The leading authority, *Tweddle v. Atkinson*, had 'departed from the law as it had been understood for the previous 200 years'.[77]

When Lord Denning claimed that Lord Mansfield and Buller J 'knew nothing' of the parties only rule, he was half right.[78] By the late eighteenth century, the courts were adopting a relaxed attitude towards the right of action for non parties in assumpsit, which, by this time, was the main remedy for informal contracts.[79] The old rule that consideration must move from the promisee remained in place, though in practice, the rules of pleading were sufficiently flexible that relatively few claims were probably defeated.[80] The position in covenant and debt where a deed was required was different. The parties only rule continued to be strictly applied.[81]

In *Drive Yourself Hire (London) Ltd. v. Strutt*, Denning LJ described *Tweddle v. Atkinson* as 'unfortunate'.[82] Later, he attempted to distinguish the decision on the basis that neither party to the contract had performed.[83] Paradoxically, *Tweddle v. Atkinson* itself can be used to mount a defence of Lord Denning's position. Numerous inconsistencies between the different reports of the case mean that it offers equivocal support for the parties only rule at best.[84] The fact that the decision came to stand for the parties only rule had less to do with what was actually said in the case than the way in which it was interpreted by late nineteenth century textbook writers.[85] A further fifty years

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[76] For example, Lord Haldane in *Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd.* [1915] AC 847, 854.
[77] *Drive Yourself Hire (London) Ltd. v. Strutt & Another* [1954] 1 QB 250, 273.
[78] *Midland Silicones Ltd. v. Scruttons* [1962] AC 446, 483.
[79] In his *Introduction to the Law of Nisi Prius* (1767) 125, Buller described how the courts currently adopted a more generous attitude towards third-party beneficiaries. He later made the same point on the bench in *Marchington v. Vernon* (1787) 1 B & P 101 note c.
[80] D Ibbetson and W Swain, 'Third Party Beneficiaries in English Law: From Dutton v. Poole to Tweddle v. Atkinson' in Ibbetson and Schrage (ed.) (n 75) 191.
[81] The rule for agreements contained in deeds was stated as long ago as the thirteenth century by Bracton, see SE Thorne (trans.), *Bracton on the Laws and Customs of England* (Cambridge, Mass., 1968) f 18 b. For a nineteenth version, see CG Addison, *Treatise on the Law of Contract and Liabilities ex Contractu* (1st edn, London, 1847) 238.
[82] [1954] 1 QB 250, 273.
[83] *Beswick v. Beswick* [1966] Ch 538, 553-54.
[84] The case was reported in (1861) 1 B & S 393, 30 LJQB 265, 4 LT 468, 9 WR 781. For a detailed discussion of these differences, see Ibbetson and Swain, (n 75).
[85] SM Leake, *The Elements of the Law of Contract* (1867) 221; F Pollock, *Principles of Contract at Law and in Equity* (1876) 190-91; Anson, (n 65) 200.

would elapse before the House of Lords unequivocally sanctioned this position,[86] but to pretend that the rule was ‘fundamental’ as Lord Denning’s critics claimed is quite wrong.

Although the Report never made the statute, book it provides the backdrop to one of Lord Denning's most famous decisions.[98] In some obiter remarks in *Central London Property Trust v. High Trees House Ltd.*, Denning J said that:

> The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better.[99]

This passage immediately attracted criticism. Later the same year, Sommervell LJ referred to Denning J's 'rather far reaching observations.'[100] His unease is unsurprising. At first sight Denning J's position is difficult to reconcile with *Foakes v. Beer*,[101] where the House of Lords had held that an agreement to accept a smaller sum in satisfaction of a larger one was unsupported by consideration. Denning J's solution was to argue that the representation was binding, not because there was consideration but because it could be brought within 'a series of decisions…which, although they are said to be cases of estoppel are not really such'.[102] But once again this led Denning J into conflict with a leading authority. In *Jordan v. Money*[103] the House of Lords had held that only representations of fact as opposed to intention were binding.

In fact, the historical foundations of these nineteenth century decisions are perhaps no more secure than *Tweddle v. Atkinson.* In *Foakes v. Beer*, the House of Lords relied on some remarks of Sir Edward Coke in *Pinnel's Case*.[104]As Ames pointed out, *Pinnel's Case* was a very unhelpful authority.[105] It concerned an action of debt at a time when differences between the forms of action remained important. In assumspit cases of the same period, such agreements were treated as

[98] Lord Denning was always candid about the influence of the Report see, Denning (n 71) 202; *Central London Property Trust v. High Trees House Ltd* [1947] KB 130, 135.
[99] [1947] KB 130, 135.
[100] *Re Venning* (1947) 63 TLR 394.
[101] (1883-84) 9 App Cas 605.
[102] [1947] KB 130, 134.
[103] (1854) 5 HLC 185.
[104] (1602) 5 Co Rep 117 a.
[105] JB Ames, 'Two Theories of Consideration' (1898-1899) 12 Harv L Rev 515, 522-23.

binding. [106] In *Foakes v. Beer*, Lord Blackburn said that he knew of no case between *Pinnel's Case* and *Cumber v. Wane*[107] 115 years later where the issue was discussed.[108] Uncertainty persisted into the late eighteenth century[109] and the first unequivocal statement of the rule in assumpsit was made as late as 1804.[110] Even then, the rule was eroded by a series of exceptions[111] and was criticized and even doubted by some influential observers. Frederick Pollock, in the first edition of his textbook, went as far as to describe *Pinnel's Case* as an 'absurdity'.[112] Pollock would only modify his stance in light of *Foakes v. Beer*.[113]

The case law before *Jorden v. Money* did not all point in one direction. There were some suggestions that a statement of intent, if relied on, was binding.[114] In any event, over time, it would be undermined by manipulating the distinction between fact and intention.[115] Denning J preferred a new solution. He turned to *Hughes v. Metropolitan Railway Co.*[116] and *Birmingham and District Land Co. v. London and North Western Railway Co.*[117] He would admit that a judgment of MacCardie J in *Hartley v. Hyams*,[118] in which *Hughes* was described as a 'broad rule of justice', first brought the case to his attention.[119] Lord Denning would also claim that these authorities were 'lost in obscurity'.[120] In fact, *Hughes* had first appeared in the

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[106] Ibbetson (n 54) 78-79.
[107] (1721) 1 Stra 426.
[108] (1883-84) 9 App Cas 605, 619.
[109] In *Heathcote v. Crookshanks* (1787) 2 TR 24, 28 Buller J referred to the unreported decision of *Hardcastle v. Howard* (1752) and an unnamed decision of Lord Mansfield's, where *Cumber v. Wane* was not applied.
[110] *Finch v. Sutton* (1804) 5 East 230.
[111] *Goddard v. O'Brien* (1882) LR 9 QBD 37, 39 'The doctrine of Cumber v. Wane if not actually overruled, has been very much qualified' (Huddleson B); JW Smith, *Leading Cases on Various Aspects of the Law* (1837) 1.148-50; Leake (n 85) 474.
[112] Pollock (n 85) 160.
[113] In the 4th edition of his textbook, published in 1885, p 180, he described *Pinnel's Case* as 'paradoxically 0 0 12 0 0 10.02 482.1

leading practitioners textbook, *Chitty on Contract*, as early as 1909. Though hardly a 'broad rule of justice' the description is still notable for its brevity:

> And as a general proposition of law, although the subsequent acts of the parties to a contract are not admissible in evidence to vary its terms, they may prevent one of the parties from insisting upon a strict performance of the original agreement.[121]

The edition of the work, published in the same year as *High Trees*, contained a similar passage.[122]

Hughes was derived from Equity. Writing in the 1870s, Pollock alluded to the tensions created by the existence of an equitable doctrine which appeared to be broader than estoppel, its Common law cousin.[123] Denning J's response was to claim that Law and Equity were fused.[124] A close examination of the background to the Judicature Act 1873 reveals that those who drafted the legislation did not intend substantive fusion,[125] though several judges seem to have thought so.[126]

Geoffrey Cheshire and Cecil Fifoot, two academics, wrote an extensive case note on *High Trees* which appeared in the *Law Quarterly Review*. They argued that the decision was based on 'a slim but sufficient catena of authority'.[127] Cheshire was a friend of Denning's[128] and had, along with Fifoot, criticised *Foakes v. Beer* in the first edition of their textbook two years before, whilst

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[121] W Paine (ed), J Chitty *A Treatise on the Law of Contract* (15th edn, Sweet & Maxwell, London 1909) 701.
[122] H Potter (ed), J Chitty A Treatise on the Law of Contract (20th edn, Sweet & Maxwell, London 1947) 192.
[123] Pollock (n 85) 561.
[124] For references to fusion in Lord Denning's judgments, see *Central London Property Trust v. High Trees House Ltd.* [1947] KB 130, 134; *Solle v. Butcher* [1950] 1 KB 671, 691; *Fredrick E Rose (London) Ltd. v. William H Pim & Co. Ltd.* [1953] 2 QB 450; *Bridge v. Campbell Discount* [1962] AC 600, 632 'law and equity are one'*; Federal Commerce and Navigation Ltd. v. Molena Alpha Inc.* [1978] QB 927, 974. He made the same point away from the bench as early as 1949, see AT Denning, 'The Recovery of Money' (1949) 65 LQR 37, 48.
[125] M Lobban, 'Preparing for Fusion: Nineteenth Century Court of Chancery' (2005) 22 LHR 389, 565.
[126] *Pugh v. Heath* (1882) 7 App Cas 235, 237 (Lord Cairnes); *Walsh v. Lonsdale* (1882) 21 Ch D 9.
[127] 'Central London Property Trust Ltd. v. High Trees House Ltd' (1947) 63 LQR 283, 288. G Cheshire and CHS Fifoot *The Law of Contract* (2nd edn, Butterworths, London, 1949) 69.
[128] *The Family Story* (Butterworths, London, 1981) 78; Denning (n 71) 200

conceding that the decision could only be altered by the intervention of Parliament.[129] The appearance and tone of the note helped to bring the decision to prominence and ensure that Denning J's judgment avoided the fate of a decision one year earlier, where Humphrey J had held that a similar agreement was binding.[130] But even if there was no deliberate plot to undermine *Foakes v. Beer*, the decision in *High Trees* no doubt delighted those who were dismayed by the failure of Parliament to implement the Law Revision Committee Report.[131]

4. LORD MANSFIELD AND LORD DENNING: 'ROUGH TRUTH'.

George Meredith, the Victorian novelist, coined the aphorism 'Caricature is rough truth'.[132] There is a good deal of 'rough truth' in the representations of Lord Mansfield and Lord Denning. At the same time, Lord Mansfield's reforming zeal can sometimes be overstated. He was well aware that change could be the bedfellow of chaos. It is no coincidence that some of his most significant innovations were built on well established principles, even if they were drawn from Equity. When an action like money had and received began to upset the equilibrium of the Common law, Lord Mansfield pulled back.

Lord Denning is more difficult to pin down than Lord Mansfield. At times he appeared to be bent on radical reform. In *Combes v. Combes*[133] and elsewhere,[134] Denning LJ would deny that it was his intention in *High Trees* to destroy consideration. But there is a strong hint that he was moving in this direction in the late 1940s, both in the way that he emphasised that promisors who intended to enter

[129] G Cheshire and CHS Fifoot, *The Law of Contract* (Butterworths, London, 1945) 64-65.
[130] *Buttery v. Pickard* (1946) TLR 241 was noted by PV Baker at (1947) 63 LQR 278 but otherwise disappeared into obscurity. Interestingly, *High Trees* did not appear in the All England Reports until 1956.
[131] For additional support for the Law Revision Committee proposals, see CJ Hamson, 'The Reform of the Doctrine of Consideration' (1938) 54 LQR 233, 239 (albeit with some reservations); Editorial, 'The Law Revision Committee's Sixth Interim Report' (1937) 1 MLR 97.
[132] G Meredith, *The Egoist: A Comedy in Narrative* (Constable, London, 1915)
[133] [1951] 2 KB 215, 219.
[134] AT Denning, 'Recent Developments in the Doctrine of Consideration' (1951) 15 MLR 1, 4; Denning (n 88) 79-80.

into a legally binding agreement, which was relied upon, should not be able to renege on their promise[135]and the way in which consideration was treated with some scepticism.[136] Towards the end of his career he would admit:

> During the 16 years whilst I have been Master of the Rolls I do not recall any case in which it (consideration) has arisen or been discussed. It has been replaced by the better precept: 'My word is my bond', irrespective of whether there is consideration to support it. Once a ma

Leading Cases.[141] He would later claim that the process 'taught me most of the law I ever knew'.[142] In a lecture delivered shortly after *High Trees*, Denning said that:

> The researches made by the legal historians of our universities have proved of utmost value. By uncovering the reason for a rule, they may enable the judge or legislator to fit the rule in its proper place and so ensure that the dead hand of the past does not paralyse the development of the present.[143]

Lord Denning may have regarded the 'dead hand' of the past with some dread. At the same time these are not the words of a man who regards the past as irrelevant and, in this respect, he was not always the figure of popular public and academic imagination.

[141] Sir T Chitty, AT Denning, CP Harvey (eds.) JW Smith, *A Selection of Leading Cases on Various Branches of the Law* (13th edn., Sweet & Maxwell, London 1929) 2 vols. The first edition was published in 1837.
[142] Denning (n 128) 94.
[143] Denning (n 139) 260.